No. 10583

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

IDAHO REFINING COMPANY,

Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief for Respondent Idaho Refining Company

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STATEMENT OF THE CASE

The Idaho Refining Company (hereinafter called the Respondent) presents herewith a statement of its case because it is thought advisable, for a clearer understanding of its position hereinafter stated, to present to the Court the defenses which it asserts.

The Respondent is a corporation organized under the laws of Nevada with its principal place of business in Pocatello, Idaho. It is engaged in refining, transporting and distributing petroleum and petroleum products. Its refinery is located at Pocatello, Idaho. From this point refined products are trans-

ported to various points of use. Transportation of its oils and gasoline has been principally by trucks and transports. For this purpose it has had in its employ in the last few years from fifteen to twenty truck drivers.

There has also been established by the Respondent a machine shop wherein its trucks and motor vehicles have been repaired. In this machine shop four men were engaged in the year 1941. One of them was Leo Archibald, who was discharged when his work became unsatisfactory.

In addition to the employees above referred to, the Respondent engaged others in various capacities and for various types of work, aggregating approximately ninety employees.

The Respondent also owned a distributing company, called Covey Gas & Oil Company of Idaho. It also had business relations with the Idaho Gas & Oil Company, an independent corporation (R.215-16). The activities of these two latter companies were devoted largely to the sale of the products refined by the Respondent.

In the Fall of 1938, shortly after the Respondent commenced business, its employees organized the Idaho Refining Company Employees' Benefit Association (hereinafter called the Association). The Respondent had nothing to do with the organizing of this Association (R.264). Its objective was to afford financial benefits in times of need to members of the Association (R.266). Some time later the articles and by-laws were amended by changing the name to include the words, "and Labor" (R. 270, 317).

The Respondent carried insurance coverage on its motor equipment with the Firemen's Insurance Company of New Jersey and the Metropolitan Casualty Company of New York. The accident record of the truck drivers became alarming. On November 10, 1941, the Respondent was advised by its insurance carriers that due to the high loss ratio the policy of insurance would be cancelled effective November 17, 1941 (R.551). The management of the Respondent knew of no way to secure other insurance than to discharge the truck drivers and employ new ones. This was done and new insurance was obtained (R.1009). Leo Archibald, who had been employed for several months, had been guilty of drunkenness and inefficiency in his work and was discharged at the same time (R.865-875). After the discharge of Leo Archibald and the truck drivers certain individuals, claiming to represent the Teamsters, Chauffeurs, Warehousemen and Helpers Local No. 983 A. F. L., interviewed the officers of the Respondent with reference to collective bargaining for its employees.

In June 1942 a consolidated complaint was filed by the Board which charged that the Respondent had dominated and interfered with the formation and administrations of the Idaho Refining Benefit and Labor Association and had restrained and coerced its employees in the exercise of their right of self organization and had discharged the Truck Drivers and Leo Archibald for Union activities and had refused to bargain collectively with the Teamsters' Union.

Respondent denied the charges. It recognized the Idaho Refining Company Benefit and Labor Association as a labor organization within the meaning of Section 2, subdivision 5

of the Act and asserts that it has dealt honorably with this Association and that it had no part in its organization and has at no time interfered with its operation or dominated or in anywise coerced any of its employees or interfered with any of their rights in any labor practice. It admits that it discharged Leo Archibald, but alleges that his discharge was for inexcusable conduct connected with his work and not for Union activities. It admits that it discharged certain truck drivers operating large transports from the Pocatello plant to points of distribution and engaged new truck drivers, and alleges that it did so because its insurance on the said automotive equipment had been cancelled by the insurance carriers due to numerous accidents sustained by the drivers and a high loss ratio and that this was the only apparent way to secure new insurance coverage, and that said discharge was not because of Union activities of said drivers and had no connection therewith. It has always been ready and willing to bargain collectively with any appropriate unit lawfully representing its employees and has at no time refused to bargain with any duly authorized Labor representatives. Other affirmative defenses will be referred to in the argument to follow.

The cause was tried before an Examiner in August, 1941 ,who reported against the Respondent on all issues. The Board refused to adopt all of the Examiner's findings and, by a divided opinion, asserted that it found violations of the Act with respect to the Association and that the truck drivers and Leo Archibald had been discriminatorily discharged, but that Respondent had not refused to bargain

collectively as charged in the complaint (R. 57, 65). By its order the Board directed the dis-establishment of the Association with various desist orders and further ordered reinstatement with back pay sufficient to make whole the machinist, Archibald, and thirteen discharged truck drivers, some of whom had been involved in minor accidents, but refused to order reinstatement or back pay of five of the discharged truck drivers who had been involved in "serious" accidents (R.60). It dismissed the charge that the Respondent had refused to bargain with the union. The Board now seeks a decree from this Court for enforcement of its Order which Respondent resists upon various grounds hereinafter stated and, particularly, upon the ground that those findings of the Board which were against the Respondent and the Order based thereon are not supported by substantial evidence and are against the law.

SUMMARY OF ARGUMENT

The findings of the Board are not supported by substantial evidence and, accordingly, the order based thereon cannot be enforced. The Association was not promoted or organized by the Respondent, and the Respondent did not dominate nor support it, nor coerce its employees in any particular. The Pocatello truck drivers were discharged because Respondent's liability insurance had been cancelled due to numerous accidents within the group and in order to secure new insurance and not because of union activities of the drivers. Leo Archibald was discharged because of misconduct and inefficiency and without knowledge on the part of his

employer that he was a member of the union. Wayne Douglas was discharged because of misconduct and serious damage caused by him to the company's property. There was no discrimination against any discharged employee.

The order of the Board is invalid and improper because it is not supported by substantial evidence and is against the law.

ARGUMENT

I.

SUBSTANTIAL EVIDENCE

The decisions of the courts uniformly are to the effect that the Board's findings are conclusive upon the courts only if the same are supported by substantial evidence. Respondent contends that such evidence is lacking in this case. As a preface to the argument which follows it is suggested that consideration be given to the type and character of evidence necessary to support such findings. This Court said in *National Labor Relations Board* vs. *Union Pacific Stages*, 99 Fed. (2d) 153, on page 177:

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29 U. S. C. A. Sec. 160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

" 'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U. S. C. A. Sec. 160 (e) (f); Washington, Virginia & Maryland Coach Co. vs. National Labor Relations Board, 301 U. S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. * * * Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. Pennsylvania R. Co. vs. Chamberlain, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' Appalachian Electric Power Co. vs. National Labor Relations Board, 4 Cir., 93 F. 2d 985, 989.

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

" 'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.' National Labor Relations Board vs. Thompson Products, Inc., 6 Cir. 97 F. 2d 13, 15."

In the case under consideration, numerous inferences are argued by the Board in support of its findings. There is no definite direct evidence in the record to support any of said findings. In the case of *Inter-Lake Iron Corporation* vs. *National Labor Relations Board* 131 Fed. (2d) 129, on page 133, it is said:

> "But an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and cannot be considered as substantial evidence. Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death.' National Labor Relations Board vs. Empire Furniture, 6 Cir., 107 F. (2d) 92, 95; National Labor Relations Board vs. Illinois Tool Works, 7 Cir., 119 F. (2d) 356."

In *Hazel-Atlas Glass Co.* vs. *National Labor Relations Board,* 127 Fed. (2d) 109, the Court, in defining substantial evidence on page 117, said:

> "'Substantial evidence' is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. vs. National Labor Relations Board, 305 U. S. 197, 229, 59 S. Ct. 217, 83 L. Ed. 126, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. National Labor Relations Board vs. Columbian Co., 306 U. S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660."

To the same effect see:

National Labor Relations Board vs. *Sun Shipbuilding & Dry Dock Co.*, 135 Fed. (2d) 15, on page 25;

National Labor Relations Board vs. *Grower-Shipper v. Association*, 122 Fed. (2d) 368, 375;

National Labor Relations Board vs. *Standard Oil Co.*, 124 Fed. (2d) 895, 903.

Relying on the standards announced in the preceding cases and many others of like effect, the Respondent urges that the Court consider the entire record in this case and the evidence adduced by the Respondent as well as that introduced by the Board. That the Board in its brief seems to recognize the necessity of doing this is evidenced by frequent references made to the testimony of the Respondent's witnesses. When the evidence is so considered, it is earnestly urged that the Court must conclude that the board's findings of unfair labor practices on the part of the Respondent are not supported by substantial evidence.

II.

RESPONDENT'S ALLEGED INTERFERENCE WITH, DOMINATION, AND SUPPORT OF THE ASSOCIATION IN VIOLATION OF SECTIONS 8 (1) AND 8 (2) OF THE ACT.

1. The Association

The Board ordered the Respondent to cease and desist from:

(a) Dominating or interfering with the administration

of the Association or with the formation or administration of any other Labor organization of its employees or from contributing financial or other support to this organization or any other labor organization;

(b) From recognizing the Association as the labor representative of its employees;

(c) From performing or giving effect to the contract entered into between the Respondent and the Association.

The Respondent is not defending the Association as such and has no desire to deal with the Association in preference to any other organization which the employees might choose to represent them. The Respondent does, however, object to this Order because of its implication that the Respondent has violated the Act. We wish to point out that there is no evidence of any defined act, or set of acts, of the Respondent to form or to recognize the Association in preference to any other labor organization. What the Board relies on as evidence of interference was rather a cooperation and feeling of good will between the Respondent and its employees in the growing pains of a newly formed and rapidly expanding company.

The Association was initiated and organized by George Hibbler and George Mann, both of whom were simple employees and neither of whom had any supervisory authority (R. 264-266; 811-812). It was organized first to afford health and accident benefits for the employees (R. 266) and developed later into a bargaining agent (R. 318). The Respondent had nothing to do with its organization (R. 264, 969). The membership in the Association of some of the

supervisory employees to which objection is made by the Board is limited to their enjoyment of the health and accident benefits derived from it (R. 928, 638, 824). The Association then performed a double function. It afforded accident benefits for its members and, at the same time, constituted a bargaining unit. The supervisory employees would obviously be interested in its first function. In every instance in the testimony, however, in which it appeared that the Association acted in the capacity of a bargaining unit the supervisory employees were absent. That this was its policy is shown by the insistence at one time by the Association that the foreman Henninger leave the meeting when a discussion of wages was about to begin (R.928).

The dual function of a similar Association was approved by the Sixth Circuit Court of Appeals in *National Labor Relations Board* vs. *Sparks-Withington Co.*, 119 Fed. (2d) 78. The Court said on page 81:

> "It is true that 8 or 10 supervisory employees joined the Society and solicited members, spoke favorably of it, kept membership cards on their desks, etc. It is unnecessary to detail these instances. So far as the record shows, the assistance of these persons derived from the confusion of functions of the Society in its early days rather than from any attempt on the part of the company to 'dominate' or 'contribute * * * support' to the Society. A few members were obtained in this manner who stated they would not have joined the Society had they known it was a collective bargaining agency. Some withdrew when they were so informed but the record is devoid of evidence that the company dominated the Society, interfered with its internal functioning, contributed any money to it or any appreciable support within the meaning of the

> Act. The minutes of the Society indicate that the meetings were held free from any coercion or interference and it appears that the members freely set up committees for discussion of their rights and grievances with the company."

The Board's petition for an order of enforcement was denied.

If the respondent is to be criticized at all, it is for its indifference to the activities of its foremen—not for any active participation. There was no participation or interference with the Association on the part of the Respondent company and it should not be penalized for the interest of some of its supervisory employees in retaining the individual financial benefits of their membership in it.

In *National Labor Relations Board* vs. *Swank Products, Inc.* (C. C. A. 3d) 108 Fed. (2d) 872, the court said, on page 874:

> "The Act does not purport to prohibit plant, or so-called 'company' unions, except where they are linked to the employer. That relationship does not arise from passive acquiescence of an employer, for acquiescence has none of the positive and aggressive quality contemplated by such words as 'interfere', 'restrain,' 'coerce,' and 'dominate,' which we find in the Act. The evidence in this case shows, we think, a genuine, if rare attempt on the part of the employees to form their own intramural union, to prevent what they considered might be a less advantageous external organization bringing them to the lower level of competing shop conditions. This had been the experience of the toolmakers which employees in other departments did not wish to follow.

"Nor do we think that the acts of Stevenson and the other shop supervisors, in forming and trying to control the policy of the new Association, were tied to the management. They were acting, so far as the evidence shows, spontaneously and for themselves. Because men express dislike to organized labor does not, as the Board suggests in its argument, indicate that they must be acting for the management."

In *Ballston-Stillwater Knitting Co., Inc.* vs. *National Labor Relations Board,* (C. C. A. 2d) 98 Fed. (2d) 758, at page 761, it is said:

"This is not the case of a 'company union' whose formation was initiated by the employer in order to combat the efforts of an outside union to organize his employees. The testimony is uncontradicted that the officers of the petitioner had no hand in establishing the Association. It is true, as the Board found, that the chief reason for its formation was to keep out the CIO, but the plan of an 'inside' union was apparently the spontaneous reaction of a group of the employees, who circulated their petitions, got up their own meetings, engaged their own attorney to draft the constitution and by-laws, and paid their expenses, without suggestion or help by the petitioner. Concededly the petitioner made no financial contributions. It is true that the petitions for membership were circulated in the mills without protest by the management, and that employees who attended the April 9th meeting during working hours were not docked in pay. But it is also true that solicitation of members for the CIO occurred, as Ingersoll testified, during working hours. Mrs. Dandareau, a witness not friendly to the petitioner, testified that a notice was posted on the time clock to the effect that it was not necessary to belong to any organization to work in the plant, and several other witnesses said that they were treated no differently by the petitioner after they joined the CIO.

> That certain CIO members were watched, or believed they were, more closely by the foreladies for infraction of the rules against leaving their machines and conversing is too weak a reed to support an inference of discrimination amounting to domination and interference in the formation of the Association. Nor is the fact that employees who attended the April 9th meeting were not docked in pay sufficient evidence of domination or interference. There was no discrimination between those who favored the 'inside' union and those who favored the CIO. No one was docked, because, as the superintendent explained, he thought that if he was liberal and did not interfere with meetings the trouble would blow over. So far as we can see the officials of the petitioner held the scales evenly balanced while the contest for membership in the two labor organizations was proceeding."

The alleged financial assistance given the Association, upon analysis, is not assistance at all by the Respondent to the Association, but, rather ,financial assistance of the Association to the Respondent. There were small, incidental advantages given to the Association, such as "check-off" of dues, the operation of a vending machine and laundry concession on the Respondent's property, the insurance payment of dues by the supervisory employees and the meetings of the Association in the Company's buildings. Balancing these items is the complete construction by the members of the Association of the meeting place and change house, later called "Simpson Hall." This was built on the company's premises, and the hall belongs to the company (R.304). The company, however, furnished only the materials, and all of the labor was donated free by the Association. Notwithstanding this contribution the Association has not had the exclusive use of the hall. In

spite of this large contribution of the Association the company did not favor it over others and the advantages of meeting on the premises were open equally to 'outside' unions. August Rosqvist, Secretary of the Idaho State Federation of Labor and Pocatello Labor Council, was invited to address a group of employees, meeting on the company's property, for the purpose of explaining the benefits of union organization (R.681). Clearly the evidence does not show financial advantages, or support, or domination of the Association by the Respondent in any respect.

Emphasis is placed by the Board's brief on the fact that the Respondent entered into the contract with the Association, renewed it, and requested the union to furnish proof of majority. It is strange that this should be argued after the Board reversed the Examiner's finding that the Respondent's request to the Union for proof that it represented a majority constituted an unfair labor practice. We submit that the most natural reaction for anyone who has already entered into a contract and is asked to break that contract is to ask for reasons to support the request. It is argued by the Board that in contrast to this request for proof of Brandt's and Rosqvist's authority, the Respondent accepted the Association without question. The obvious answer to this argument is that the Respondent knew its employees and did not know Brandt or Rosqvist, nor whether they represented those whom they professed to represent.

The contract with the Association, moreover, resulted after arbitration and refusal on the part of the Respondent to grant the wage increases demanded by the Association (R.

320-323, 344-345). This was also true of the original contract in 1941. The wage scale adopted by the company and accepted by the Association contained an increase which was not as much as had been demanded (R.275). The company consented to the wage scale agreed upon on the condition that the Association would sign a contract for one year (R. 275, 341). The contract was drawn by the attorney for the Association (R. 342).

All of the members of the Association who testified, including even the witnesses for the Board, stated that there was no influence brought upon them by the Respondent. John Anderson, for example, said: "I don't think that the company ever influenced the Association whatsoever in any way." (R.295). See also Haskell Duncan's and Delmar Peter's testimony (R. 333, 334, 339).

It is submitted that the evidence does not show any interference or domination on the part of the Respondent in the Association affairs. It does show a cooperation and good will between employer and employees. Such cooperation should be encouraged, rather than discouraged, by the Board.

In *Jefferson Electric Company* vs. *National Labor Relations Board* (C. C. A. 7th) 102 Fed. (2d) 949, it is held:

> "The National Labor Relations Act does not manifest intent to prohibit friendly intercourse between employers and labor organizations, to curtail freedom of speech, to deprive the employer of the right to express honest opinions, or to outlaw the extension of common courtesies, and sponsoring of friendship between employer and employees is in keeping with the purpose of the Act."

This case further holds that while the Act condemns employer leadership through supervisory employees, and pressure which overrides employees' will constitutes interference with workers' rights to select representatives, yet a mere showing of preference and acts of cooperation do not constitute such interference. On page 956, the Court says:

> "In the instant case there were no threats so as to intimidate the employees into joining a particular labor organization against their will, and there is no evidence in the record which would warrant a finding that the conduct of the company was indicative of coercion or intimidation. To us it is clear that the company had come to a realization that its plant was about to be unionized. It had for many years maintained friendly relations with its employees and desired that such relations continue. It was in this spirit that it allowed the use of the cafeteria and other plant privileges. Such acts, standing alone, are not inconsistent with a strict 'hands-off' policy. It was never the intention of Congress to prohibit friendly intercourse between employers and labor organizations, to curtail freedom of speech, to deprive an employer of his right to express an honest opinion or to outlaw the extension of common courtesies. It is more in keeping with the purpose of the Act to foster such friendship rather than to condemn it."

We have mentioned that there is no proof of actual interference or domination on the part of the Respondent in Association affairs and that the acts of the Respondent's supervisory employees did not affect the other employees. On page 10 of its brief the Board cites cases which it claims hold that there is no need of actual proof of the effect of the practices

upon the employees. The statement quoted[1] and cases cited are not in point. If there is a direct violation of a specific act prohibited by Section 8 (2) or Section 8 (3), probably the effect upon employees need not be shown, but we submit that a violation of Section 8 (1) or that part of Section 8 (2) which makes it an unfair practice to dominate or interfere with the formation or administration of any labor organization requires a showing of effect upon the employees. In all the cases cited on page 10 of the Board's brief there is evidence that some of the employees were influenced or there were no facts to rebut the inference drawn that the acts would reasonably have restrained the employees' choice. In the case at bar, however, the definite evidence of the witnesses is that the Respondent did not influence the employees (R. 295, 333-4, 359). This evidence necessarily rebuts a mere inference that the Respondent's acts did influence them.

2. Alleged Interference and Coercion

On pages 11 to 14 of its brief, the Board refers to several statements which it contends indicates an anti-union attitude on the part of the Respondent.

Aside from the fact that there is no substantial evidence indicating that, even if made, any of them had any effect whatever on any employee, it is urged by the Respondent that they are wholly insufficient to constitute substantial evidence

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[1] "If the words or deeds of the supervisory employees, taken in their setting, were reasonably likely to have restrained the employees' choice and if the employer may fairly be said to have been responsible for them, they are a proper basis for the conclusion that the employer did interfere."

to prove any charges of the Board. They are presented by the Board in an effort to show attempts to block union activities and as possible reasons for discharge. We wish to examine such statements alleged to have been made and to show why the same could not have the effect indicated by the Board.

These statements are mentioned in the Board's brief as part of its discussion of the discriminatory discharges, and we shall refer to them in detail later in our discussion of those discharges. All of these statements are testified to by interested drivers and denied by those who allegedly made them. Many of them are pure hearsay. The Board found that they were made. If its finding is persuasive there is still no evidence that such statements, at any time, influenced the employees or were made for the purpose of influencing them. They were sporadic, unauthorized statements which were contrary to what the respondent's acts, its practice and its attitude to the unions are shown to be.

In *Quaker State Oil Refining Company* vs. *National Labor Relations Board* (C. C. A. 3rd) 119 Fed. (2d) 631, it is held:

> "Isolated and casual conversations by superintendents with men concerning the advisability of proposed union which had not the slightest effect in preventing or discouraging membership in the union did not support finding that employer was responsible for the statements of superintendents and that it thereby interfered with, restrained and coerced its employees in the exercise of rights of self-organization and collective bargaining guaranteed them by the National Labor Relations Act."

On page 632 the Court says:

"The Board found the petitioner guilty of two unfair

labor practices. The first was that two supervisory employees by their statements to individual employees discouraged membership in the Union. The supervisors in question were Healy, the field or pipe line superintendent, and McElhatten, the superintendent of maintenance at the refinery. Healy asked one employee what the employees figured could be gained by membership in the Union and said that it would be lots cheaper and the employees just as far ahead, if they hired a local attorney to represent them rather than putting out quite a lot of money and not getting much in return for it. He made similar remarks to another employee and declared to a third who said he hoped to gain seniority rights that there was no such thing. To a fourth he said he did not see how the union could benefit the employees and that he believed the petitioner would shut the plant down before giving recognition to it. McElhatten stated to one employee with reference to the welding of certain tubes that prior to the Union that work would have to be done at the petitioner's shop but after the Union they intended to send the work away. He also said that in future they would let out to contractors what work they could. He made a similar statement to another employee. In the case of Healy none of the employees to whom he talked was under his supervision.

"It is quite clear that all of these conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union."

So, in the case under consideration, if any of these statements were made they were casually made and without the slightest effect in actually preventing or discouraging membership and do not support the charge of coercion and domination.

In *National Labor Relations Board* vs. *Sands Manufac-*

turing Company, 306 U. S. 332-346, 83 L. Ed. 682, at page 688 the Court says:

> "The Board supports the conclusion by reference to the testimony of two men. One, Norman, who was, with the union's consent, discharged after the agreement of June 15, 1935, for incompetency, testified he thought he was discharged as a result of a grudge. He said that in June, one McKiernan, a shipping clerk who was his superior, told him when he complained about his discharge: 'I will tell you; there is a lot more of this than you and I know of * * * 'I will get you back when we break this union up.' * * * There is the further testimony of a witness Rudd who says that the superintendent said to him in June, in effect, that it would be better to have the A. F. of L. union as they were more conservative and not so likely to strike. This was just after MESA had called two strikes in the plant. Neither of the men who are quoted held such a position that his statements are evidence of the company's policy even in June, two months before the discharge, and the inference of hostility to MESA drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of union activities and in dealing freely and candidly with MESA."

In the case of *Martel Mills Corp.* vs. *National Labor Relations Board,* (C. C. A. 4th) 114 Fed. (2d) 624, it is held:

> "In the absence of evidence of any policy of proscribed discrimination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities."

See also *C. G. Conn. Ltd.* vs. *National Labor Relations Board* (C. C. A. 7th) 108 Fed. (2d) 390, 400.

Even assuming that the statements which it is charged were made were actually uttered, though their alleged authors em-

phatically denied having made them, it is respectfully submitted that in the light of the foregoing cases there is completely lacking any substantial evidence to prove that such statements had any effect, or to prove that they amounted to more than harmless, casual remarks.

III.

THE RESPONDENT'S ALLEGED VIOLATIONS OF SECTION 8 (3) AND SECTION 8 (1), AS IT REFERS TO DISCHARGES.

1. The Discharge of the Pocatello Truck Drivers

On November 13, 1941, the Respondent discharged all of the truck drivers who were driving heavy equipment at Pocatello. The Board found that this discharge was discriminatory. It based this finding upon its conclusion that the discharge was made because the drivers had joined the Union. The Board concluded this because of random statements that officers of the company were antagonistic to unions. It concluded this in spite of a complete lack of evidence that the cause of discharge was the Union membership and in spite of the uncontradicted evidence that the officers who effected the discharge knew nothing about the Union membership of the drivers (R. 800, 1003, 1004). Opposed to these inferences and conclusions of the Board is the positive testimony introduced by Respondent that it discharged these drivers because its liability insurance had been cancelled and because its officers concluded that the only way to obtain new insurance was to show to the new insurance companies that the major cause of its accident record had been eliminated.

Respondent submits that it would be manifestly unfair to enforce an order of the Board based as it was, upon inferences opposed to the clear testimony showing why the discharge was made.

In the case of *Martel Mills Corporation* vs. *National Labor Relations Board,* 114 Fed. (2d) 624, on page 631, the Fourth Circuit Court of Appeals said:

> "Obviously our chief guide is the words of the witness under oath who undertook to disclose the workings of his mind. If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation. See *National Labor Relations Board* vs. *Remington Rand, Inc.,* 94 Fed. 2nd at page 862. We are not convinced that the Board has offered sufficient evidence to meet its burden of proof. Isolated statements which alone carry incriminating import often lose their ominous significance when surrounded by all the facts of a given case. We do not find substantial evidence to support any illegal motive such as is proscribed by Section 8 (3) of the Act."

The Board found that eighteen drivers who were discharged on November 14th from the Pocatello plant were dismissed because of their union membership, though the evidence is uncontradicted that the decision to discharge these men was arrived at by officers who knew nothing of their union activities. It was made in an emergency requiring drastic measures to re-obtain insurance coverage, without which the plant could not distribute its gasoline. The insurance policy covering the trucks the discharged drivers were operating had been cancelled by the insurance companies due to a high loss ratio as the result of a series of accidents. The president and

vice president of the company, one of them an active insurance agent and the other an attorney with many years of insurance experience (R. 794, 1021), both decided that in order to obtain new insurance it was necessary to terminate the services of these drivers and present a different picture to the insurance company to whom they were applying for new insurance (R. 800, 1003). Whether their judgment was right or wrong is immaterial. This Board had no right to pass upon the wisdom of their decision. In view of the findings, however, it is necessary to look in retrospect at the reasonableness of their decision in order to show the inaccuracy of the Board's inference that union activities of the drivers were the cause of their discharge.

The history of the difficulties encountered by the Respondent and the necessity for the decision to discharge the drivers may be briefly summarized. The insurance for the respondent on its motor equipment was carried by the Firemen's Insurance Company of Newark, New Jersey, and the Metropolitan Casualty Company of New York, under Policy No. FM-199. This Policy expired August 22, 1941. There had been serious losses under this Policy and the insurance companies had become uncertain as to whether or not the policy should be renewed (R. 795, 797). Mr. Little, representing the insurance companies, had frequently criticised these losses (R.725) and had made certain personal observations of excessive speed on the part of the drivers of the trucks (R.720-722). From his study of the losses he concluded that the trucks and equipment were in good mechanical condition and that the losses were due to the fault of the drivers (R.718).

A short time before August 22, 1941, Gilbert Sheets, President of the Respondent, and Little met with a Mr. Chadwick, Little's superior, in Salt Lake City, and discussed the losses and the possibility of a renewal. It was thought that probably the drivers would improve and that the losses might be minimized (R. 724, 796). Accordingly, Policy FM-227 was issued as of August 22, 1941. Between this date and November 3, 1941, eleven accidents occurred, causing thirteen losses (R. 752) aggregating about $4,000.00 (R. 724). The major portion of these losses, and particularly in amount, was with the truck drivers driving the large transports from the Refining Company to distributing points. The insurance companies thereupon concluded that they would not continue to carry the insurance. On November 10, 1941, they sent a telegram to the Idaho Refining Company as follows (R.551):

> "Idaho Refining Company—Due to high loss ratio experienced on equipment owned by your corporation for past few years we are cancelling off Policy FM-227 by registered cancellation notice to be effective November 17, 1941, noon standard time. Please make other arrangements for insurance.
>
> FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY
>
> METROPOLITAN CASUALTY COMPANY OF NEW YORK, NEW YORK."

Usually five days' notice is given under such circumstances before cancellation becomes effective, but in this instance Mr. Little, who sent the telegram, knew the serious difficulty the Respondent would have in getting new insurance and accordingly extended the date of cancellation (R. 730, 798). Before

sending the telegram Mr. Little had given oral advice to Gilbert D. Moyle, the manager of the respondent, and to Gilbert S. Sheets, the President. Mr. Sheets lived in Salt Lake City. The entire matter was referred to him. He at once attempted to communicate with Henry D. Moyle, Vice-President and Attorney for the Company, but Mr. Moyle was in San Francisco. He returned to Salt Lake City on the evening of November 11th and on November 12th Mr. Sheets and Mr. Moyle had a conference in which they considered the cancellation of the insurance and determined upon the policy to be pursued (R. 799, 1002). Mr. Sheets and Mr. Moyle, by virtue of their insurance experience knew the attitudes of insurance companies toward such matters. They fully understood that new insurance could not be obtained without some drastic change. Sheer business necessity required insurance coverage. In addition thereto some of these trucks were engaged in interstate commerce and the Interstate Commerce Rules required insurance in all instances where the company could not qualify to carry its own insurance. The respondent, in this instance, was not able to do this (R. 1012, 854). These men concluded that there could be no reasonable expectation to secure other insurance unless these drivers were discharged. They "decided at that time that [they] would either have to do that or quit business" (R. 1002). The time was short. A decision had to be quickly made. They could not change the equipment; they could not change the job to be done; hence the only conclusion they could reach was that they must change the drivers (R.1005). The various officers of the company had been frequently criticized because of high losses and frequent wrecks caused by the drivers (R. 756, 796, 1001).

In arriving at the decision to discharge the drivers these officers were actuated with the sole purpose of continuing the business of the respondent. The activities of the drivers with the unions or their membership in the union never entered into the picture and these officers had no knowledge of such claimed membership or activities (R. 801, 1003-4). There is no proof in the record contradicting this fundamental item of evidence. The decision to discharge the drivers was arrived at in Salt Lake City by Gilbert S. Sheets and Henry D. Moyle on November 12, 1941, and it was agreed that Mr. Moyle should go to Pocatello on the day following and advise the General Manager to carry out this instruction (R.1005).

The conclusion of Mr. Sheets and Mr. Moyle that it would be necessary to discharge truck drivers in order to secure new insurance was the result of their own intimate knowledge of the insurance business and insurance companies' requirements (R.1021). That this conclusion was sound is amply supported by additional evidence. After the discharge the various insurance agents who were approached for insurance considered the discharge of the drivers as a reason for writing the insurance and new insurance ultimately written was upon the basis that the drivers had been discharged. Mr. Benson, an insurance agent, studied the risk and made a proposal to the respondent. Mr. Sweeney, his agent in Idaho, proposed accepting the risk upon the condition that the drivers would be discharged (R.763). Mr. Benson was asked and answered the following question:

> "Q. I will ask you to state in that connection whether or not, if the drivers involved had not been dis-

charged, would you have considered the writing of this insurance under any circumstances?

A. No, sir." (R.765-6).

The proposal to accept the risk and write the insurance made by the company Mr. Benson represented is contained in respondent's Exhibit No. 5 (R.768). It is to be noticed that in this proposal it is recited:

> "These quotations are submitted with the understanding that you have discharged all drivers in your employ prior to October 17, 1941, and that none of these old drivers will be rehired."

The new insurance was finally secured through an insurance agent named Walter W. Watkins and one of the statements inducing the acceptance of the risk was that the truck drivers had been discharged. Mr. Watkins testified:

> "I told Mr. Salisbury—he is the manager of the Kolob Corporation * * * that the Idaho Refining Company was getting new drivers, and intended to install this safety campaign wherein they would pay bonus rewards to drivers who were not involved in accidents, and Mr. Salisbury took the matter up with the Denver office." (R. 778, 779).

> "Q. You heard Mr. Salisbury discuss this matter over the telephone with Denver?

> A. I was in his office at the time he discussed it.

> Q. And what representations did he make to Denver?

> A. He explained to Mr. Lou Gerding, the branch manager, that this line was being cancelled by the Metropolitan Casualty Insurance Company. He

> explained to him that it was because of the high loss ratio and frequency of accidents, that we had been assured that there was to be a new set of drivers on these transport units. I think that there were—if I remember right, I think that Mr. Moyle told me that there were some 17, in that neighhood, 17 or 18, I believe he said, and Gerding, if I remember correctly, called us back and said it was all right to issue a binder for ten days. Then we figured the premium on the risk and submitted it to you for approval, and it was given to us on November 24th" (R.780-1)

> "Mr. Moyle explained to me that he was going to use more care in selecting new drivers, and that they were going to install this safety campaign. That was the reason for our entertaining the insurance." (R.783)

Henry D. Moyle came to Pocatello November 13, 1941, and advised Gilbert D. Moyle, the General Manager, and Frank Copening, the Secretary, of their decision to discharge the drivers in order that they might get new insurance.[2] This order was reluctantly carried out by the local manager (R.1006). Kermit Rice was instructed to carry out the orders and did so on the early morning of November 14, 1941. The

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[2] The petitioner's brief suggests that there is a conflict in the evidence in Copening's statement that the decision to discharge the Pocatello drivers was made on November 13th. This was a natural statement as far as Copening was concerned. He first heard of it on the 13th, but the discharge was not determined by him or by Gilbert Moyle. Copening himself said that Henry Moyle informed him that to put the company in such a position that it could get insurance it would have to get a new crew of drivers (R.650).

drivers were advised that the discharge was rendered necessary because of the cancellation of insurance due to heavy losses.

The discharge of these drivers was therefore a matter of business necessity and expediency and had not the slightest connection with union activities. Not only did Mr. Sheets and Mr. Henry D. Moyle know nothing of union activities or membership of these drivers, but there is no substantial evidence in the record indicating or even suggesting that Gilbert D. Moyle, Frank Copening, Kermit Rice, or any other supervisory employee in the plant at Pocatello had any such information, and each of them definitely denies that he did have such knowledge. The evidence shows, without contradiction, that the first affirmative act tending to give notice to the respondent of membership of any employee in the union was the presentation of the contract late on the morning of the 14th after the decision to discharge all the drivers had been made and after most of them had been told of it.

Some of the drivers had not had accidents, but they belonged to the group which President Sheets and Vice-President Moyle regarded as a unit in fixing the blame for the insurance cancellation (R. 1005, 1032, 799, 802). Whether the judgment of the officers of respondent in handling the problem as they did was right or wrong is not a matter for the Board's consideration. We submit that well adjudicated cases definitely support the respondent in this particular.

It is held in *National Labor Relations Board vs. Union Manufacturing Company* (C. C. A. 5th) 124 Fed. (2d) 332:

> "It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities."

This same thought is expressed in *National Labor Relations Board vs. Jones and Laughlin S. Corp.* 301 U. S. 1, 81 L. Ed. 893, on page 916, as follows:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

In *Jefferson Electric Company* vs. *National Labor Relations Board* (C. C. A. 7th) 102 Fed. (2d) 949, 957, it is said:

> "Under the National Labor Relations Act, the right to hire and to discharge remains inviolate, when exercised for ordinary ends. The employer may still discharge for good cause or no cause at all."

In the case of *National Labor Relations Board* vs. *Union Pacific Stages* (C. C. A. 9th) 99 Fed. (2d) 153, 177, this Court said:

> "The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. It did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee wa sactually discriminated against because of his union activities or offiliation * * * The Act does not vest in the Board managerial authority."

In *National Labor Relations Board* vs. *Williamson-Dickie Manufacturing Company* (C. C. A. 5th), 130 Fed. (2d) 260, 267, the Court says:

> "In view of the very large powers and wide discretion granted by the Act to the Board and the grave consequences of an abuse of these powers and this discretion by the Board, we cannot, in the exercise of our function in enforcing the Board's lawful orders and in refusing to enforce those which are not, too often repeat, that it has not been given to the Board to substitute its own ideas of discipline and management for those of the employer. It has not been given to it to supervise and control, except as precisely set out in the act, or set standards for, the supervision and control of employee and employer relations."

In view of the argument of the Board that the decision to discharge the drivers was made at Pocatello on November 13th, let us analyze the testimony of Henry and Gilbert Moyle and of Gilbert Sheets, as well as that of Captain Frank Copening and get a picture of the relationship of these men to each other and the company. We should remember that Gilbert Moyle, the manager, and Frank Copening, the secretary, resided in Pocatello and their office was there, while the president and vice-president, Gilbert Sheets and Henry Moyle, lived and had their offices in Salt Lake City, Utah. While these latter received a daily financial report, from the refinery, these reports did not contain anything of the activities of the drivers (R.808). When on November 10th the company was notified that its insurance would be cancelled on the 17th, Henry Moyle was on the coast. It was the 12th before he returned to

Salt Lake and still nothing had been accomplished toward getting new insurance. Henry Moyle and Gilbert Sheets then sat down in Henry Moyle's office and evolved a plan which to them would be the most effective way of convincing insurance companies that the Respondent planned to eliminate the accidents as far as possible and get a better accident record (R.798-9, 1003). It was too late at that time to institute regular safety measures. Something swift and instantly obvious had to be done.

The Board found that it is unlikely that any insurance company would have required the Respondent to discharge drivers with perfect records. We have already pointed out that at least one insurance company required that the drivers remain discharged as a condition to its insuring the company's trucks. Furthermore, the Board introduced no testimony that any insurance company would have written new insurance on the basis suggested in the finding. The Board's brief waves aside the fact that Benson, agent of one insurance company, and Watkins and Salisbury, agents of another company, required the discharge of the drivers, on the theory that these men were insufficiently informed of the true state of affairs. The fact is, however, that they were as well informed of the state of affairs as the President and Vice-President who made the decision to discharge the drivers. Neither of these officers, in the immediate urge of obtaining new insurance, stopped to get the old accident records from the insurance company to find out which of their drivers had had accidents and which had not, even if these records were available, which does not

appear[3]. Even by the time of the hearing it had been difficult to get them (R. 1033). The President and Vice-President did not have them when they made this decision (R.1022). Without records they made the decision then and there to discharge all of the drivers in order to get insurance, and without any knowledge of their union activities. It might have been better if it had been possible to pick out only those drivers who had had accidents, but we cannot properly look back now and from our hindsight determine whether the best judgment was exercised. The crux of the matter is that the decision was made and that union membership had nothing to do with the decision.

Why were only the drivers of Pocatello discharged and not the drivers of the Idaho Gas & Oil Company and the drivers on the Columbia River in Oregon and Washington under the direction of R. E. Stiff? This question is raised by Petitioner's brief. An understanding of the set-up of the Idaho Refining Company clearly answers this question. We believe that a careful analysis of the evidence explains why no thought was given to the discharge of any but the Pocatello drivers.

There were five distinct sets of equipment which were insured under the policies taken out by the Idaho Refining Company:

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[3] The Board's brief urges that the accident record of Respondent's drivers were admittedly available at Salt Lake City on Nov. 12th. The record references there made do not sustain this contention. The uncontradicted evidence is to the contrary (R. 1022). Only the major wrecks had been reported (R. 1003, 1019). Neither is there evidence that the employment records at Pocatello would have shown the individual accident records.

1. The heavy transports—trucks and trailers hauling out of the plant at Pocatello. These constituted by far the main portion of the long haul equipment under the policy (R. 804, 806).

2. The long haul equipment consisting of some four or five trucks and trailers under the direction of R. E. Stiff. These worked out of Baker, Oregon. Stiff owned the trucks originally and transferred them temporarily to the Idaho Refining Company when the source of his gasoline from the Inland Empire Refinery dried up. Companies ceased shipping gasoline to Attalia and Umatilla. The transfer to Idaho Refining Company was a temporary one and the trucks were later turned back to Stiff. Stiff was to have control of the drivers (R.994). Stiff, however, and the drivers, were on the payroll of the Idaho Refining Company at the time that the Pocatello drivers were discharged.

3. The Covey Gas & Oil Company trucks—small runabouts for distribution between close stations. Some of these trucks were owned by the Covey Gas & Oil Company, a subsidiary of respondent Idaho Refining Company; others were owned by individual operators.

4. Trucks operated under the direction of Sheppard in Boise and owned by individual service station lessees who were buying the trucks through the Idaho Refining Company, and which were on the policy by virtue of the lien held by the respondent on these trucks. The trucks were owned and driven by these individual service station operators and the respondent had no control over them. Pierson is one instance of this

(R.674). Conrad is another (R.678). The operation of the men out of Boise was separate and distinct from that of the operation of the drivers out of Pocatello. They were not connected in any way with the refinery and they got their gas from a different source. Even if Gilbert Sheets and Henry Moyle had had the power and authority to discharge these men it would have been surprising if they had thought to include those drivers.

5. Personal cars owned by employees of the respondent and Covey Gas & Oil Company. These cars were not involved in any accident and the drivers were employees in various capacities.

If it be assumed that union membership was the basis of discharge of the drivers, why were not the drivers under the direction of Stiff discharged at the same time? It was known definitely that they were members of the union (R. 532, 534, 623). This, we believe, is a complete refutation of the inference that the discharge of the Pocatello drivers was due to their union membership. In view of the fact that the bulk of the driving, the bulk of the work, the center of interest of Gilbert Sheets and Henry Moyle was in the Idaho Refining Company plant at Pocatello, it is natural that when they decided to discharge drivers as proof to insurance companies of their intention to reduce losses they centered on the Pocatello drivers. In fact, under the circumstances and the haste of their decision caused by the necessity of getting new insurance it would have been surprising if they had done otherwise.

The Board's analysis of the records of the drivers who were discharged and those who were not discharged is totally

beside the point. It would have been pertinent had there been any claim that the Pocatello drivers were discharged because of their driving records. This was never the claim. They were so discharged because the officers decided that the discharge of the group was necessary to present a clear picture to the insurance companies.

On page 20 of Petitioner's brief is a list of the drivers from Pocatello and other points on which the insurance company paid claims. We should remember that the insurance company paid claims on all the cars in which the respondent had an interest, even as mortgagee.*Every driver named in that list, in both notes 20 and 21, who the evidence shows was an employee of the Respondent, was discharged.* There is no evidence that any of the men listed in footnote 21 except Douglas were employees of the company. Douglas was discharged. The record is uncontradicted that Pierson (Pearson) and Conrad were lessees, not employees (R.674), and that Crawshaw was an employee of Idaho Gas & Oil Company.

It is to be remembered that the Pocatello truck drivers formed a unit out of which the most serious accidents occurred, and when Gilbert Sheets and Henry Moyle considered the problem they looked upon the unit as the offender rather than the individuals (R.802).

In spite of the cleverly inaccurate arguments on pages eleven and twelve of Petitioner's brief there is not one word of evidence in the whole record that the reason for the discharge was the union membership of the drivers. Most of the drivers joined the union in September, 1941, and the "inten-

sive membership drive" mentioned in the Petitioner's brief was made a full two months before the discharge (R.415). Why were not the drivers discharged at that time rather than when the insurance was cancelled if the discharge was for union activity, and if the Respondent was as bitter against unions as the Petitioner's brief argues?

An analysis of the union activities of those drivers who were discharged and who were not discharged leaves the Board's finding without substantial evidence to support it.

We have already shown that the River drivers who were not discharged were nevertheless members of the union (R.534). A finding that the Pocatello drivers were discharged because of their membership in the union necessarily overlooks the fact that two of them, K. C. Brower, and H. H. Hendrickson, were not themselves members of the union. Brower was in difficulties with the union and Hendrickson did not get a bid, though he tried to get in and paid a preliminary $6.25 (R. 484-497, 585, 586, 690). That the company was not antagonistic to the union membership of the men it discharged is definitely proved by the fact that it offered re-employment to a number of them. R. E. Miller was re-engaged March 11, 1942 (R.602) and, at the time of the hearing, was still working for the company. Obviously, his membership in the union was no deterrent to his re-employment. The offer of employment to other union drivers is significant and bears out Respondent's contention that they were discharged because of insurance problems and not because of their union activities. Within a month after their discharge as drivers they were offered reemployment in the company,

not as drivers, but as workers on the loading docks. Myron Whitesides was offered re-employment December 14, 1941, on the loading dock (R. 909, 910). He was at that time working for the Covey Gas & Oil Company. He accepted employment with the Respondent February 11, 1942, where he remained until June 19, 1942 (R. 910, 911) when he left of his own accord. John Evans and Boyd Cornia were both offered re-employment on the loading docks on December 15, 1941, but each declined employment because he said he had been advised by the union that it would hurt his case against the Respondent (R. 912, 913). Evans, who testified for the Board, admitted this offer and his rejection (R.520). S. R. Burkholder was offered employment February 20, 1942, but declined because he secured employment with Garrett Transfer Company (R.916).

The fact that a number of these men were thus offered re-employment is, we contend, striking proof that they were discharged because of the cancellation of the insurance and not because of membership in the Teamsters Union, nor activities on its behalf.

On this point the Fifth Circuit Court of Appeals said in *National Labor Relations Board* vs. *Dixie Motor Coach Corp.* (C. C. A. 5th) 128 Fed. (2d) 201, 203:

> "Further, Wilkinson on two occasions was offered other positions with the companies which he declined for reasons of his own, and the companies did not hire any new employee prior to Wilkinson's refusal of the employment offered. Such manifest willingness to continue Wilkinson in their employ is wholly inconsistent with the theory that the companies discharged

him illegally because he gave testimony at the hearing, and the finding of discriminatory discharge cannot be upheld."

It is further to be remembered that Guy Campbell was a member of the union at the time he was working for the Idaho Refining Company (R.586). If it be presumed that the company had knowledge of union membership of the discharged drivers in November, 1941, the presumption should go as well to knowledge of Campbell's union membership months prior to that time, yet no action was taken against Campbell because of union activities.

A fair consideration of all of the testimony leads unquestionably to the definite conclusion that these men were discharged for reasons stated by the President, Gilbert S. Sheets, and the Vice-President, Henry D. Moyle, following the notice of cancellation of insurance and, as these officers honestly believed, to make it more likely that the Respondent could secure other insurance.

2. Discharge of Leo Archibald

The Board found that Leo Archibald, one of the four mechanics in the Respondent's shop, was discriminately discharged because of his union membership and his activities on behalf of the union. There is no substantial evidence upon which this finding can be based and all the evidence is to the contrary. It shows:

1. That Archibald's activity was unknown to the Respondent and was so little noticeable that some of his closest associates knew nothing about it;

2. That though two of Archibald's co-workers also joined the union with him they were not discharged;

3. That Archibald's work was unsatisfactory, and had been the frequent cause of complaints from his superiors, which complaints were becoming more frequent immediately prior to his discharge; and that he was discharged because of his misconduct.

Archibald testified that he made some effort to secure union memberships and delivered some union dues to the union secretary. There is not even a scintilla of evidence that such activities were known to the Respondent or to Archibald's superior.

It is significant that Earl H. Brown, the mechanic who worked daily alongside of Archibald all summer and who worked with him more than any other man, did not know that Archibald was a member of any union. His uncontradicted testimony is as follows:

"Q. Had Mr. Archibald ever said anything to you about being a member of a labor union?

A. No, sir.

Q. Did you know whether or not he was a member of any labor union?

A. No, sir.

Q. Had that matter ever been discussed between you and Mr. Archibald?

A. No, sir.

Q. Had his membership in any labor union organization ever been discussed by you or anyone else?

A. Not that I ever recall.

Q. Did you know whether or not he was a member of any union?

A. I did not.

Q. And you worked right alongside of him during the entire summer?

A. Yes,sir." (R.843).

When the evidence shows such little union activity on the part of Archibald that his co-worker knew nothing about it, certainly it cannot be surmised that Rice and the respondent knew of it. There is not one word of evidence in the record to the effect that Archibald's union activities came to the notice of higher management officers, yet the Board's finding is based upon the inference that they had such notice, and this in spite of definite denials of Rice (R.876) and of Gilbert Moyle (R.961) that they knew he had joined the Union. Archibald himself admitted that Rice at the time he was employed did not ask anything about his labor affiliations and at no time suggested to him what he should do in reference to his labor associations (R.434).

If it be assumed that Rice and the Respondent knew that Archibald had joined the union the assumption should apply as well to his associates Orin Thomas and Wayne Nord, both of whom joined the union with him (R. 441, 450, 690). If union membership, then, was the basis of Archibald's dis-

charge Orin Thomas and Wayne Nord would have been discharged with him, but they were not.

Leo Archibald was discharged because of poor work and absences which all resulted directly from his drinking and drunkenness. Through his drinking he was away from work more than any of the other mechanics; frequently when he was on the job his work was slow and unsatisfactory. Sometimes he could not work at all. On one occasion he burned a hole in a tank four inches from the spot he was supposed to be welding (R. 868, 443, 850). At that time Archibald had been drinking (R.851); he could hardly get out of a fifteen-foot wide door (R.867). On five or six occasions Archibald reported though he was not able to work. "He would show up sometimes and would get sick and have to lay off or go outside or something and he wasn't able to get down under a truck and work" (R.838). At one time he came to work, left, and went outside into a car and stayed there all day. At that time "Spike" Henninger met him coming out of the door, looked at him a minute and said: "Boy, you sure had a tough night!" Archibald's eyes were all bloodshot and his face was very red. He wasn't any too steady on his feet and his breath smelled of liquor. Later Rice went over to Henninger and asked him whether he had seen Archibald; that Archibald had disappeared. Still later Rice noticed him in a car outside the gate (R. 870, 906).

Archibald's work became more and more unsatisfactory (R.866). His co-worker began to complain. Brown said: "I would have to stay and do the work on account of him not

being able to work, and I would have to come back nights to do it, because we were shorthanded by him laying off, and he finally was too slow to keep up his end of it, the way I looked at it, and I mentioned it to Mr. Rice a time or two." (R.839). About two or three weeks before Archibald's discharge, Henninger asked Rice when he was going to get somebody that could hurry up a little bit. He had reference to Archibald at the time (R.907). Gilbert Moyle, who had had complaints from Rice and Brown that Archibald had been drinking and was laying off too often, told Rice about November 1st that he did not see why Rice put up with him any longer. Rice said: "As soon as we complete the work that we have on hand we will get rid of him" (R.960). The climax came on the Monday prior to Archibald's discharge. Once again when he came to work he said he had the bellyache. He had been off the day before that. Rice said to him that he just couldn't stand that kind of carryings-on any more at all (R. 871, 899). Archibald was all bent over. His eyes were bloodshot and Rice concluded from that that he had been drinking again (R.901). On that day Rice fully made up his mind to discharge Archibald (R.879).

Rice kept Archibald on after that Monday until some work was completed and then discharged him at 8:00 o'clock on the morning of November 14th (R.879).

The officers of the company left the discharge of Archibald entirely up to Rice, and knew nothing of the actuality of his discharge until after it was effected. Rice never received a specific order to discharge him on the fourteenth (R. 961, 1004).

National Labor Relations Board vs. *Dixie Motor Coach Corp.* (C. C. A. 5th), 128 Fed. (2d) 201 involved the drinking by the discharged employee in question. On page 203 the Court said:

> "Against this overwhelming evidence indicating that the reason for the discharge of Richards was that assigned by the manager, the record contains only the following: Richards' denial that he had been drinking regularly or was drunk on the occasion immediately preceding his discharge; evidence that Richards was an active union member and that his membership might reasonably have been known by the management; and the background of the hostile attitude of the companies toward the union. The public interest, as well as that of the employer, requires of any one entrusted with the lives and safety of the traveling public that he conduct himself in a manner in keeping with his responsibilities. We think the record is without substantial evidence to support the finding that Richards was discharged because of union activity, and that the reinstatement of such an employee to such a position would do violence to the public welfare and to the purposes of the National Labor Relations Act. The undisputed facts show that this employee's drinking habits were such as to place upon his employer the duty to discharge him."

In *National Labor Relations Board* vs. *Sheboygan Chair Company* (C. C. A. 7th) 125 Fed. (2d) 436, on page 439 the Court said:

> "We think the Board was unwarranted in its conclusions based upon an inference drawn from the fact that Moegenburg belonged to the union, attended a union meting, there made a complaint, and during the adjustment of that complaint Moegenburg said Hamilton 'bawled me out for squawking to other peo-

> ple.' There is not one scintilla of evidence that Hamilton or any of the officials of the respondent knew that Moegenburg belonged to the union or that he had attended the meeting or knew about the complaint he had made at the meeting. There is no evidence as to who the 'other people' were to whom Hamilton referred. There is an abundance of undisputed evidence that Moegenburg was a chronic 'squawker' and 'squawked' to his fellow workmen repeatedly.
>
> "When honorable men, wholly unimpeached, testify under oath to their reasons for discharging a man and such reasons are supported by all the evidence in the case and are not in any way connected with the discharged employee's union activities, the Board is not justified in discarding all of this evidence and finding the employer guilty of an unfair labor practice based upon a sequence of three or four unrelated events."

In *National Labor Relations Board* vs. *Thompson Products, Inc.*, (C. C. A. 6th) 97 Fed. (2d) 13, the Court said that the small value of the lamp stolen by a discharged employee was of little importance, though the Board in its findings, laid emphasis on this point. That was a matter for the management to decide. On page 16 the Court said:

> "An employer may properly refuse to continue in his employ any person who has shown himself to be dishonest, incompetent, inefficient, negligent, or unfaithful to his employer's interest or otherwise unfit for the service in which he is engaged. The National Labor Relations Act does not abrogate any of these prerogatives, nor can employees use it as a shield for dishonesty or incompetent and inefficient service."

It is to be remembered that Archibald was working on trucks engaged in interstate commerce. Particularly applicable

is the case of *National Labor Relations Board* vs. *U. S. Truck Co.* (C. C. A. 6th) 124 Fed. (2d) 887, wherein, on page 889, it is said:

> "Under the regulations of the Interstate Commerce Commission, 49 C. F. R. 193.3 all motor carriers and their officers, agents, employees and representatives are required to comply with the regulations relating to the driving of vehicles, and every motor carrier must require that its officers, agents, employees and representatives shall become conversant therewith. Section 193.6 provides that no driver shall go on duty while under the influence of nor drink while on duty any alcoholic liquor or beverage nor knowingly be permitted so to do. In compliance with Sec. 193.3, the respondent had promulgated rules applying to all employees, forbidding the use of intoxicating liquor while on duty. The continuing failure to discharge Graham, who was a driver, endangered the public safety, was a violation of the company's rules, the safety regulations, and the State statutes and was cause for revocation of the license to operate. Warrem was the chief body repairman for trucks and trailers. In that position he was responsible for the condition of tailboards or tail gates, doors, and other parts of the trucks and trailers, the importance of whose condition for public safety is expressly recognized by the safety regulations, 49 C.F.R. 193.10. The public safety required that Warren also comply with the rules as to use of intoxicating liquor when on duty. Obedience to the express provisions of the regulations and of the state statutes required the dismissal of Graham long before the company acted. Obedience to their spirit also required the dismissal of Warrem. The same considerations require that Graham and Warrem be not reinstated * * * Where the order of the Board as to reinstatement indisputably requires the employer to violate other statutes highly important to the public safety, even though union membership is found by the

> Board to be the ruling motive for the discharge, this court has authority to vacate the order as violative of public policy and contrary to law."

We may summarize the discharge of Leo Archibald by paraphrasing the words of the Second Circuit Court of Appeals in *Ballston-Stillwater Knitting Co., Inc.* vs. *National Labor Relations Board* (C. C. A. 2nd) 98 Fed. (2d) 758 on page 764 as follows:

> "The inference that [Archibald] was discharged because of [his union] membership instead of [his] violation of the rule and [his] habitually poor work is too arbitrary to stand. To sustain it on such a record would grant to members of a complaining union absolute immunity from discharge for inefficiency."

The evidence is uncontradicted that Archibald's conduct was unsatisfactory to his superiors, both Rice and Gilbert Moyle. Archibald himself admits criticism (R.446). There is no question that his defalcations became more annoying as they continued. The final straw was his drunkenness and absence on the Sunday and Monday preceding the discharge. Rice's testimony is uncontradicted that he determined on Monday, the 10th, to discharge Archibald, and that he did so discharge him as soon as certain work was finished. To say that the "few minor derelictions which were admitted by Archibald were not the motivating cause of his discharge" (R.54) is to disregard all the evidence of the growing dissatisfaction of Rice, Henninger and Moyle with Archibald's work and to substitute mere surmises and conjectures for substantial testimony to the contrary.

In *Wilson & Co. vs. National Labor Relations Board* (C. C. A. 8th) 123 Fed. (2d) 411, the Court pointed out, on page 418 that the superintendent gave the reason for his not employing a certain individual, who the Board had presumed was not employed because of her union leanings. It said:

> "Obviously, this presumption of the Board cannot stand as against this positive, uncontradicted and unimpeached evidence."

So, we urge, the Board's presumption that Archibald was discriminatorily discharged should not stand against the uncontradicted evidence of his poor workmanship and the dissatisfaction of his employers with his conduct and type of work.

We invite the Court's attention to the fact that both the Examiner and the Board in their findings and decision went to great lengths to discard Respondent's reasons for Archibald's discharge and struggled desperately for reasons to support the charge of discrimination (R. 98, 105, 53-55). They found it significant that Archibald was discharged on November 14th, the same day that the drivers were discharged. This, together with Archibald's union membership and some solicitation of other members, all of which was unknown to the Respondent, constitutes the entire basis for the finding of discriminatory discharge and this, we urge, is not substantial evidence and the finding is wholly unsupported.

3. Discharge of Wayne Douglas

The Board found that Wayne Douglas was discrimina-

torily discharged, but, because of his accident record in the handling of Respondent's truck, it does not require reinstatement nor any back pay.

The Respondent contends that the finding of discrimination in the discharge of Douglas is not supported by any substantial evidence. No such evidence is recited in the Board's comment touching this discharge. The Board's comment in its decision is restricted to an attempt at refuting the Respondent's explanation of the discharge, rather than asserting any evidence justifying its conclusion (R. 55, 57). This is the natural result of lack of evidence of discriminatory discharge.

In *Interlake Iron Corp. vs. National Labor Relations Board,* 131 Fed. (2d) 129, the Seventh Circuit Court of Appeals said, on page 134:

> "The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board. National Labor Relations Board vs. Union Manufacturing Co., 5 Cir., 124 F. 2d 332, 333; Hazel-Atlas Glass Company vs. National Labor Relations Board, 4 Cir., 127 F. 2d 109."

In its brief the Board stresses the fact that five weeks passed between the time of Douglas' accident, for which he was discharged, and the date of his discharge. The Board also mentions this in its decision. A search of the records shows why this period of time elapsed. Douglas originally drove for the Respondent out of Pocatello until he was discharged because

he had misrepresented his age (R.535). When he became of age he was re-hired in 1941 and worked out of Baker, Oregon, under the direction of Earl Stiff. The relationship between Stiff and the Respondent was peculiar. Stiff originally owned his own trucks. For a period he transferred those trucks to the Respondent and was on the Respondent's payroll, but his relationship was almost that of an independent contractor (R. 993, 994). He insisted on independence so far as the handling of his own drivers was concerned. During the period of time in which the Respondent operated Stiff's trucks and kept Stiff on its payroll, it was agreed that Stiff had the right to re-purchase his trucks and that Stiff should "hire and fire" his own drivers (R.994). Stiff had told the Respondent that he was particularly anxious to keep the drivers that he then had working on the equipment and that he would not enter into this agreement unless he could "hire and fire" his own drivers.

Wayne Douglas on October 16th drove a transport loaded with gasoline off his route into Weiser, Idaho, to see his sister and a girl friend (R.957). In Weiser he drove too fast and, while going around a corner in the residential part of town, tipped over, smashed his transport, and poured more than 4000 gallons of gasoline down the street, into the gutters and into the sewer (R. 545, 956). His carelessness was inexcusable, and Douglas admitted that he expected "a lot of criticizing." Gilbert Moyle, when he heard of this accident, rushed over to Weiser, saw the wrecked truck and told Stiff then and there to discharge Douglas, using the following language: "Lay him off, fire him right now, I am through with such

driving." (R.957). Gilbert Moyle returned to Pocatello and understood that Douglas had been discharged (R.958). Stiff apparently did not follow the directions. When the next payroll records came down to Pocatello from Baker, Oregon, they showed that Douglas was still driving for Stiff. When Gilbert Moyle examined the payroll he discovered that Douglas' name was on it and again immediately ordered Stiff to discharge Douglas (R.959). This was November 20th (R.542).

It is hard to understand how the Board can draw an inference that the reason for Douglas' discharge was his union membership or activities. There is no evidence of any union activity on the part of Douglas, except his membership in the union; and all of the drivers working for the Respondent out of Baker, Oregon, under Stiff were also members of the Union (R.534). Douglas, of course, was a member of Local 440, as were the other discharged drivers (R.539), but there is no testimony to support an inference that Douglas would be discharged by the Respondent because he was a member of Local 440 while the Respondent would leave untouched those drivers who were members of the Baker Local. Such an inference imputes not only intimate knowledge of union connections of each of the employees but also implies a dislike of one Local above that of another. There is nothing in the testimony to show this. The Board has not ordered the reinstatement of Douglas, and this discussion is academic, except for the attempt by the Board to tie in Douglas' discharge with that of the other drivers in an apparent desire to strengthen the charge of discriminatory discharge of these other drivers.

D. *The Board's Unfounded Inferences of Discrimination*

In the beginning of that section of its brief which discusses the discriminatory discharge of the drivers the Board tries to justify its ruling that the drivers were discriminatorily discharged by setting forth certain alleged anti-union remarks of the employees of the Respondent. The employees themselves denied having made these remarks and many of them are in the record over the objection of the respondent that they were hearsay. Other comments have been takn out of their setting by the witnesses and misinterpreted. For example, Supt. Rice is claimed to have assured a new truck driver that he had a job as long as he went along and did his work; that the discharged drivers were never going to drive out there again. What actually happened in that conversation was that Rice, hearing that the discharged drivers had threatened to attack Moss in a restaurant, told him to stay away from those fellows to keep from getting beat up (R.892). The Board's brief attempts to show an anti-union attitude on the part of the Respondent in its alleged efforts to "insulate" the new drivers at Pocatello. It quotes the hearsay evidence of McBride who testified that Stiff had told him that Gilbert Moyle had told Stiff that these drivers transferred from the Columbia River section to Pocatello must not talk union to the Pocatello drivers. Besides being pure hearsay, this is not credible for the reason that McBride and the other river drivers had already worked in and out of Pocatello, had had previous contacts with the Pocatello drivers, had met them frequently at service stations where they were servicing the same territory and already had ample opportunity if they desired to discuss union matters with them (R. 628-629).

McBride further testified that Gilbert Moyle said that if the drivers joined the union, he would "can" them and if he could not get other drivers, he would hire old women. A ridiculous statement like that should be questioned at the outset. Either it was not said or it was said jokingly. That it is not a true manifestation of Gilbert Moyle's attitude is shown by his employment of McBride himself at that time, knowing he was a union driver (R.629). He later hired other men who had been working for Stiff—all union members, to work for him out at the refinery, knowing that they were union laborers (R.532-534).

Furthermore, R. E. Miller, one of the discharged drivers, was re-employed, although he belonged to the union. Henninger, the Respondent's foreman, told him that it would not make any difference whether he belonged to a labor union or not (R. 612, 613). Kermit Rice (R.865), Guy Campbell (R.586) and the river drivers (R.533-534) were all union employees of the respondent. So were the men offered jobs on the loading dock: Evans, Corina and Burkholder (R.913-917). The attitude of the Respondent toward labor unions should be judged by its acts, rather than by these alleged statements of its agents. These acts show not anti-union activity, but the reverse.

That such statements and the others mentioned in the report, if made, did not express the attitude of the company nor have the effect charged by the Board is certainly proved by the attitude of the Respondent toward labor unions in general, as shown by its course of business. All of the major improvements and additions built by the Respondent were

done so by union labor. A $60,000.00 asphalt plant, a several thousand dollar boiler house, a heating unit, additions to the office building, and miscellaneous small improvements were built with union labor pursuant to an agreement with labor representatives (R.945-947). During these extended periods of construction, the Idaho Refining Company employees were working all the time with the union craftsmen (R.947).

The history of the company's dealing with its employees definitely proves that the employees had absolute freedom to join any union they desired. In the spring of 1939 Mr. Rosqvist, a union state secretary, expressed a desire to unionize the plant (R.813). The Respondent thereupon caused to be called a meeting of all of its employees and invited labor leaders Rosqvist and Brandt to address the meeting (R. 681, 814). When the employees assembled, Webb, Secretary of the company, advised that these men were present for the purpose of explaining the benefits of labor unionism and that the members could do exactly as they pleased with respect to it; that they could join the unions or not, as they desired. It was entirely up to the employees (R. 278, 635). The union representatives spoke to the employees and fully explained their views. Following this and in the absence of the labor leaders and company officials the employees freely expressed their desires by vote (R.636).

The Board's brief further attempts to show an anti-union attitude of the Respondent by random statements of two supervisory employees of the Respondent (Rice and Miller) made after the discharge. By doing this, the Board attempted to show Respondent's attitude through its witnesses' inter-

pretation of Rice's and Henninger's post mortem conclusions of what might have been the reasons for the discharge. In the first place, there is nothing to show that Rice and Henninger were ever confidants of the officers of the Respondent who decided the discharge. Everything in the evidence points to the contrary. In the second place, a conclusion of employees uttered after an event as to the reason for that event is far from evidence that should be recognized as substantial.

In *National Labor Relations Board* vs. *Mathieson A. Works* (C. C. A. 4th) 114 Fed. (2d) 796, the first point is quite fully discussed. The ruling of the Court, as expressed in Syllabus No. 3, is as follows:

> "Sporadic activities, on the part of foremen, not authorized by the employer and not resulting in interference with or domination of right of employees to organize and select bargaining representatives of their own choosing, does not nullify a choice freely made by the majority of employees acting on their own initiative."

Assuming that the statements were made as it is claimed —even assuming in contrast to the Respondent's acts that there was an anti-union attitude on its part—even under that assumption there is not sufficient evidence to warrant the decision of the Board that the discharges were discriminatory.

In *National Labor Relations Board* vs. *Goodyear Tire and Rubber Company*, 129 Fed. (2d) 661, the Fifth Circuit Court of Appeals said, on page 664:

> "Accepting the preliminary fact findings of the Board as correctly found as to each, we think it clear that under the controlling principles of law its ultimate

finding in each case, except that of Parker, is wholly without support in the evidence. Taking them individually and as a whole, the ultimate findings or inferences of the Board were based on nothing more than that the evidence showed antipathy to United, and the persons discharged in each case for an assigned cause, were members of or applicants for membership in United. This will not at all do. Nothing is better settled in the law than that while discharges may not be made because of and to discourage union membership or activity, membership in a union is not a guarantee against discharge, nor does the fact alone, that an employer dislikes a union or a union man, prevent his exercising his undoubted right to discharge. Findings of the Labor Board just as findings of a jury, must rest upon evidence, not surmise or suspicion, *Magnolia Petroleum Company vs. N. L. R. B.* 5 Cir. 112 F. 2d 545. It is only fair to say however that the confusion of law in the mind of the Board, that antipathy toward a union once shown to exist, is all the evidence needed to convict of a discharge as an unfair practice, is a natural one. It arises from the fact of the Board's dual relation to the charge. Its right hand accusing, its left hand hearing as a judge, it is the most natural thing in the world for the Board to sometimes forget that as accuser it must make, as judge it must have, not surmise but proof, of the facts on which a finding of unfair practices is to be based. Quite natural too is it that occasionally the suspicion, surmise, feeling and conviction which gave legitimate force and vigor to it as prosecutor, should, in its dual capacity, be allowed to suffice for proof. But this of course will not do. For the Board as accuser must furnish to itself as judge, proof in such amount and quality, that one having no interest whatever as accuser and interested only in a just result, could reasonably draw the inferences of guilt which as accuser, it belabors itself as judge to draw

"We and other courts have in many cases set down the rule which must guide the Board in deciding matters of this kind. In *N. L. R. B. vs. Riverside Mfg. Company*, 5 Cir., 119 F. 2d 302, at page 307, we said of a discharge: 'The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the management did not like the union or his belonging to it, and had said so. If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them.' "

In *National Labor Relations Board vs. Tex-O-Kan Flour Mills Co.*, 122 Fed (2d) 433, the same Court said on page 438:

"In the matters now concerning us, the controlling and ultimate fact question is the true reason which governed the very person who discharged or refused to re-employ in each instance. There is no doubt that each employee here making complaint was discharged, or if laid off was not re-employed, and that he was at the time a member of the union. In each case such membership may have been the cause, for the union was not welcomed by the persons having authority to discharge and employ. If no other reason is apparent, union membership may logically be inferred. Even though the discharger disavows it under oath, if he can assign no other credible motive or cause, he need not be believed. But it remains true that the dis-

> charger knows the real cause of discharge, it is a fact to which he may swear. If he says it was not union membership or activity, but something else which in fact existed as a ground, his oath cannot be disregarded because of suspicion that he may be lying. There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. This was squarely ruled as to a jury in Pennsylvania R. R. Co., vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819, and the ruling is applicable to the Board as fact-finder."

The facts in the foregoing cases are more against the employer than are the facts in the case at bar.

Because of some disputed testimony of isolated anti-union statements on the part of some of the officers, the Board concluded, in spite of the Respondent's many pro-union acts, that Respondent had an anti-union attitude. It then inferred that the discharge was effected because the drivers were union members. Against this inference is the established proof that the President's and Vice-President's decision was made in ignorance of union activity, to make possible the getting of new insurance. We submit that in the light of this proof the inference falls.

IV.

THE ORDER OF THE BOARD

When the record is viewed in its entirety the picture presented is substantially this:

The Pocatello drivers constituted a unit working out of the Pocatello plant. They were involved in serious accidents

within a short period of time. They undoubtedly realized this would make trouble for the Respondent. During this period of time they joined a union. When these accidents culminated in the cancellation of the insurance, the officers of the Respondent at Salt Lake City determined that the discharge of this group was essential in order to obtain new insurance. This was done, and the fact that these drivers belonged to a union and a few scattering remarks of various employees of the Respondent has caused the issuance of an order by the Board directing the disestablishment of the Association and the re-employment with back pay of various discharged employees. The fact that Archibald was discharged at the same time is a mere coincidence.

The Respondent contends that the order is not based upon findings supported by substantial evidence and that the direct evidence produced by the Respondent in support of its position has been disregarded by the Board and, therefore, this Court should not issue a decree in support of the Board's order.

Attention is further called to the fact that by this order the Respondent is required to offer re-employment and to make whole fourteen of the discharged drivers. It is not required to give further attention to the five drivers whom the Board finds are responsible for the "serious" accidents (R.60-63). There were, however, four additional drivers in this group who had been engaged in accidents but apparently because the amount of loss was not so great as with the others the Board failed to exclude them from the order of re-instatement. These drivers are Ellingford (R. 513, 751 and 789), Burkeholder (R.514), Evans (R. 527-530, 884) and Stanger.

The insurance was cancelled because of the frequency of the accidents as well as of the amount involved. The fact that the insurance company did not have to pay all these smaller losses was certainly immaterial in determining upon the discharge and if the order is to be upheld in any of its parts these four drivers should be excluded from reinstatement along with the other five. Furthermore, for reasons stated in this brief, Respondent should not be compelled to re-employ one who conducted himself as did Archibald, nor make additional payments to drivers who refused re-employment when the same was offered to them.

V.

CONCLUSION

It is respectfully submitted that the Board's findings are not supported by substantial evidence and that the order based thereon is invalid and improper and this court should not issue a decree enforcing said order in full, or at all, as prayed for in the petition of the Board.

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